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NTSB Order No. EA-4301

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of December, 1994

RAYMOND FRANCIS GRZYBOWSKI,)	
)	
Applicant,)	
)	
v.)	
)	Docket 191-EAJA-SE-13322
DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The applicant, Mr. Raymond Grzybowski, has appealed from a written initial decision and order Administrative Law Judge William E. Fowler, Jr., issued on June 28, 1994, denying his application for an award of attorney fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.¹ For the reasons discussed below, the decision of the law judge is

¹A copy of the law judge's decision is attached.

reversed.

The Board in NTSB Order EA-4045 (served December 14, 1993) sustained the Administrator's charge, in an emergency order of revocation, that Mr. Grzybowski had operated an aircraft carelessly or recklessly, within the meaning of section 91.13(a) of the Federal Aviation Regulations (FAR), by not shutting down its engine before his wife departed the aircraft to remove chocks from the nosewheel aft of the propeller, in preparation for a flight home to Clarksburg, MD, after a weekend trip to Niagara Falls, NY.² We concluded, on evidence that a reasonable and prudent pilot would not "unnecessarily expose anyone to the extreme hazard a spinning propeller represents" (Id. at 4), that Mr. Grzybowski had violated the regulation prohibiting careless operation. However, we did not affirm revocation, but determined, instead, that a 60-day suspension of Mr. Grzybowski's commercial pilot certificate would be an adequate sanction for the needless endangerment to which he had subjected his wife.

The law judge concluded that the applicant, who did not argue that he was entitled to an EAJA award for defending against the alleged violation of FAR section 91.13(a), was a prevailing

²For reasons about which we can only speculate, Mrs. Grzybowski's effort to remove the chocks resulted in her death from contact with the propeller. She had made some 45 flights in the aircraft with her husband, to whom she had been married for about a year, and she was in the aircraft when it was discovered, after engine start, that the chocks must have been left in place. Mrs. Grzybowski, known by the name Anne K. Bittinger, was a health professional who worked as a psychotherapist at a hospital and in private practice, held three master's degrees, and was in good physical condition.

party on the matter of sanction, a conclusion the Administrator has not challenged with an appeal.³ However, because the law judge determined that the Administrator was substantially justified in pursuing the sanction of revocation, he denied the applicant's request for EAJA fees related to his success in having the sanction modified by the Board to a suspension. We think the law judge erred in finding that the Administrator had substantial justification for seeking revocation.

Our decision to modify the sanction in this action from revocation to a suspension reflected an assessment that although Mr. Grzybowski had demonstrated a deficiency of judgment in exposing his wife to risk,⁴ we did not believe that his decision justified the kind of sweeping condemnation of qualifications that revocation signifies.⁵ In other words, we did not find Mr. Grzybowski's lapse in judgment to have been qualitatively distinguishable from that displayed in innumerable other cases in

³As this matter was not challenged by the Administrator, we do not reach the issue, nor here hold, that an applicant who has shown merely a reduction in sanction, without more, is a prevailing party for EAJA purposes. The law judge appeared to conclude that this case fit within the limits of our holding in Application of Gilfoil, NTSB Order No. EA-3982 (1993), a conclusion we do not here examine.

⁴Indeed, the record showed that Mr. Grzybowski's wife, while not a pilot, demonstrated her awareness of the hazard by staying close to the wing and well back of the moving propeller as she approached the nosewheel from the side. The nosewheel on the aircraft is located about two feet behind the propeller.

⁵At the same time, our decision does not foreclose a conclusion that a pilot's qualifications might be drawn in issue where his operation of an aircraft presents an unnecessary, and potentially lethal, hazard for an individual, such as a minor, who could not reasonably be expected to appreciate or avert the

which only a suspension had been imposed on proof of an airman's creation of an endangerment or putative involvement in an unsafe practice.⁶

The dispositive issue on this appeal is whether the law judge correctly concluded that the Administrator had a reasonable basis in law for the sanction he sought. In this connection, the applicant argues that Board precedent does not support the Administrator's choice of sanction because even though the Board has in the past affirmed revocation for a single instance of carelessness involving multiple violations, see, e.g., Administrator v. Dunston, 1 NTSB 1581 (1972), it has never affirmed revocation for a violation of section 91.13(a) alone.⁷ The Administrator nevertheless argues that the applicant's carelessness was so extreme that it should be held sufficient to justify revocation, an argument the law judge appears to have found persuasive in light of the testimony of an FAA inspector to the effect that the applicant's conduct had demonstrated a lack

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danger posed.

⁶ Every violation of FAR section 91.13(a), and its predecessor section 91.9, embodies, by definition, a finding that someone's life or property has been imperiled. Moreover, other violations, involving certainly no less risk and arguably revealing a more flawed safety consciousness, in that the victims of the careless or reckless conduct frequently have little or no ability to evade the danger inflicted upon them, are routinely sanctioned with suspensions. For example, the range of sanction for both low flight over congested areas and operations creating a collision hazard is a suspension of airman privileges for from 60 to 180 days. See FAA Order 2150.3A, Appendix 4.

⁷The parties have not drawn our attention to any case factually similar to this one.

of qualification. We do not share the law judge's apparent view that the inspector's largely conclusory opinion on the matter was adequate to end the inquiry as to the reasonableness in law of revocation. Rather, we think that given the absence of any direct precedent to support revocation, the Administrator was obligated to explain why revocation was warranted here either in terms of any relevant enforcement objectives and policies, on the basis on special factors validating his choice in this instance, or both. We cannot conclude that that obligation was met.

Aside from referencing the undeniably serious hazard a spinning propeller poses and berating the applicant for not acting with due respect for the risk of injury or death it represented, the Administrator has made no effort to identify any sanction guidance criteria that would compel a conclusion that revocation was appropriate or any enforcement interests that revocation, but not a suspension, would have served or furthered.

The Administrator's silence in this regard does not, in our view, lend credence to his assertion that the choice of sanction in this proceeding was unrelated to the fact that the incident resulted in Mrs. Grzybowski's death, a circumstance which Board precedent makes clear should not influence the decision on sanction. See, e.g., Administrator v. Wood, 3 NTSB 3974, 3976 (1981)("fact that injuries were sustained during the landing...is clearly an improper basis for imposing a greater sanction than the violations themselves would otherwise warrant.").⁸

⁸Our precedent in this connection flows basically from the

We perceive no penal interest in a sanction that the death of Mr. Grzybowski's wife did not trump. Furthermore, since Mr. Grzybowski's misjudgment does not appear to have involved any deficiency in his aviation knowledge or operational capabilities, it is far from clear why a remedial order such as a revocation would have been believed necessary. The Administrator has offered no useful argument on these points. And, given the great personal loss suffered by Mr. Grzybowski, the severity of any sanction imposed on him is not likely to have any significant impact on the deterrence value of the case for other pilots who learn of it.

In sum, in a case where the airman had already suffered intensely and uniquely from a mistake that has not been shown to reflect, and does not appear to implicate, a broad or general inability to exercise airman privileges with the requisite care, judgment and responsibility, the Administrator pursued a sanction for which he cites no close precedent and offers essentially no argument that his enforcement responsibilities would not have been adequately discharged by an order less severe than revocation. We cannot, in these circumstances, agree with the

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rationale that unsafe conduct does not become more unsafe or more serious because the reason why the conduct is unsafe, and therefore prohibited, has been realized. In other words, Mr. Grzybowski's violation stems solely from his failure to turn off his aircraft's engine before his wife got within the area of risk the propeller presented. Thus, he would have been subject to enforcement action for a violation of FAR section 91.13(a) even if his wife had succeeded in removing the nosewheel chocks with the engine running and had re-entered the aircraft. We think it highly unlikely that if a case based on those facts were brought to us that the Administrator would press for revocation.

law judge that the Administrator established that he had a reasonable basis in law for seeking revocation. The case will, therefore, be remanded to the law judge for an assessment of EAJA fees and costs fairly attributable to the Administrator's unjustified pursuit of an excessive and unwarranted sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. The applicant's appeal is granted, and
2. The case is remanded to the law judge for such further proceedings as are necessary to determine the appropriate EAJA award, if any, to be paid to the applicant.

HALL, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board concurred in the above opinion and order.